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RICHARD L. TRUMKA'S REBUTTAL TO RESPONSES TO *WHY LABOR LAW HAS FAILED*

RICHARD L. TRUMKA

In advancing a modest proposal to deregulate labor law by abolition of the National Labor Relations Board (NLRB or the Board), I had hoped to provoke a recognition of the social justice issues implicated by the destruction of the American industrial way of life and the contemporaneous attempt to devalue and deinstitutionalize labor. As a labor lawyer myself, I arrive at the conclusion that labor law is obsolete only reluctantly. After reading and thinking about the responses to my proposal, I can only adhere to my view that the current system of administrative law has failed. Nevertheless, I am pleased that the thoughtful responses to my proposal have vindicated my initial hope that a call for the radical restructuring of American labor relations would provoke a searching debate.

However, I must confess to some disappointment respecting some of the responses. Robert Steptoe's response¹ assumes, I think quite wrongly, that all the social justice issues respecting labor relations have long been settled, and that machinery of American labor law is both normatively correct and structurally sound. I simply cannot accept Mr. Steptoe's "if it ain't broke, don't fix it" complacency. I know, from my own experience, and from colleagues in and outside the labor movement, that great and unredressed injustices are being perpetrated upon America's working men and women and their families. I attempted to put the case for abolition of the NLRB so starkly in order to provoke in my audience some acknowledgement of this underlying social misery. It is not certain that even a "sophisticated audience predominated by law professors, law students, and practicing members of the bar . . ."² would necessarily perceive this human misery unassisted. The great advances in social justice that make American history so rich, such as the movement in the 1930s to empower industrial workers, and the movement in the 1950s and 1960s to secure de jure equal rights for minorities, did not originate in sophisticated audiences predominated by law professors, law students, and practicing members of the bar. If anything, only a minority of our profession actively supported these social justice movements.

In short, I cannot accept the view that there are no moral issues involved in contemporary labor relations and that anyone speaking about labor in modern America should be restricted to tinkering with case law formulations and administrative arrangements. My experience with unemployed mine workers and steel

¹ Steptoe, *Mr. Trumka: If It Ain't Broke, Don't Fix It!*, 89 W. VA. L. REV. 895 (1987).

² *Id.* at 899, n.11.

workers and their shattered families does not allow me such complacency. My reply to Mr. Steptoe is that the world is not as right as he may think it is. At the center of my concern about the NLRB is Mr. Steptoe's assertion that it provides enforcement mechanisms for "previously ephemeral [worker] rights."³ I must respectfully dissent. What does the law administered by the NLRB do to assist workers in securing collective bargaining agreements? What enforcement mechanisms, in actual practice, apply to employers? Surely, the National Labor Relations Act (the Act) is massively violated and only randomly applied to those employers who have the misfortune of arousing the bureaucratic pique of the agency by their defiance. Daily, union adherents are illegally fired, democratically-chosen worker representatives improperly bypassed, and collective bargaining transformed into a ritualistic farce.

The administrative agency charged with redressing these wrongs acts only sporadically, and when it does, it usually acts too late. A respected court, the Second Circuit Court of Appeals, harbors "grave doubts about the ability of the courts to make the provisions of federal labor law work in the face of persistent violations."⁴ The Second Circuit's doubts are well founded; the NLRB does not effectively enforce the rights of workers. By marked contrast, the most trivial union infractions of the often incomprehensible restrictions on the exercise of the right to strike routinely provoke immediate response from the NLRB under section 10 of the Act.⁵ For workers, the NLRB is a procedural maze reminiscent of *Jarndyce v. Jarndyce* litigation in Dickens' *Bleak House*.⁶ Yet, "aggrieved" employers get the fast lane treatment of the "priority charge" and section 10(1) proceedings.

The views of Joseph Price are less establishmentarian and thus more interesting.⁷ I obviously agree with his criticism of the "convoluted and bureaucratic procedures"⁸ of the NLRB, and his complaint that Board law is often unpredictable. Equally, I disagree with his view that social justice in the workplace represents an unjustifiable fettering of capital.⁹ I do, however, endorse his view that labor and management might be able to achieve more workable solutions autonomously without the dead hand of the bureaucracy. The responses of Marian

³ *Id.* at 896.

⁴ *NLRB v. J. P. Stevens & Co., Inc.*, 563 F.2d 8, 25 (2d Cir. 1977); *see also* *Textile Workers v. J. P. Stevens & Co., Inc.*, 475 F.2d 973, 974 (D.C. Cir. 1973).

⁵ National Labor Relations (Wagner) Act, ch. 372, § 10, 49 Stat. 453 (1935)(codified as amended at 29 U.S.C. § 160 (1982)).

⁶ C. DICKENS, *BLEAK HOUSE* (1977).

⁷ Price, *Has Labor Law Failed? A Management View*, 89 W. VA. L. REV. 915 (1987).

⁸ *Id.* at 917.

⁹ *Id.* at 922-23.

Crain-Mountney,¹⁰ Lance Compa,¹¹ and Laurence Gold,¹² present more food for thought than those of Messrs. Steptoe and Price. My differences with Professor Crain-Mountney, Lance Compa, and Laurence Gold are, at bottom, mainly semantic. Each recognizes the level of the problems and calls for far-reaching reform.

My differences with Messrs. Compa and Gold are over a label. What they call reform, I would call deregulation. I wholeheartedly endorse Mr. Compa's view that; "In today's political and economic climate, workers cannot sit still and wait for the pendulum to swing back."¹³ The very creative political action suggested by Lance Compa and Laurence Gold as necessary to achieve labor law reform is the very same force I hope will bring to an awareness of the American public, and our legislators, the need for greater social justice in the workplace. I remain convinced that moral wrongs will prompt political responses and that our system is sufficiently adaptive to accommodate change in the name of social justice.

I would like now to suggest a more focused view of what is wrong with American labor law. It is simply that labor law, as currently structured, does not allow the enforcement of the rights of workers against the real labor relations decisionmakers. If those responsible for labor relations cannot be held accountable under the law, then the principle of the rule of law in resolving labor disputes is abridged. The inherent rights labor gave up, including the right to strike the employer and his allies in order to compel bargaining, have been exchanged for an illusion. The central theme of the Wagner Act was, of course, to promote industrial stability through free collective bargaining by bringing the employer to the bargaining table. If labor law is so impotent that it cannot "escort" the real party in interest "to the bargaining door," then the entire system designed to promote collective bargaining is undermined.¹⁴ Labor and the public are both cheated, justice in the workplace becomes completely ephemeral, and industrial peace becomes an impossibility, because any mutuality of obligation is avoided on the employer side.

Although the Act evinces an intent to render rights effective against all labor relations decisionmakers, current American corporate practices effectively insulate the actual policymakers from the enforcement mechanisms and sanctions of the law. The NLRA broadly defines employer as "any person acting as an agent of

¹⁰ Crain-Mountney, *Has "Labor Law" Failed? A Rejoinder to Richard Trumka*, 89 W. VA. L. REV. 903 (1987).

¹¹ Compa, *Comments on Richard Trumka's Why Labor Law Has Failed*, 89 W. VA. L. REV. 909 (1987).

¹² Gold, *The Capricious Lure of Labor Law Regulation*, 89 W. VA. L. REV. 883 (1987).

¹³ Compa, *supra* note 11, at 913.

¹⁴ 76 Cong. Rec. 7660 (1935).

an employer, directly or indirectly. . . ."¹⁵ The language and legislative history of the statute's definition of "employer" establish a broad congressional policy to render "any person" making labor relations decisions for an employer responsible from the line foreman to the corporate "labor relations consultant" who advises the parent corporation headquartered far from the workplace. In spite of this broad statutory reach, the structure of American corporate law has allowed, and indeed prompted, employers to create fictions of decentralization that disguise the sources of labor relations decisions. The real powers rarely appear at the bargaining table or at the NLRB hearing. Unions are relegated to a futile attempt to enforce rights against corporate shells while those with power and authority continue to avoid the consequences of, and responsibility for, their often devastating decisions.

Thus, the real decisionmakers, insulated by a web of corporate feints and shams, can issue decrees that devastate communities and disrupt settled ways of industrial life. The true role of the real decisionmakers can be discerned only after the most detailed and painstaking detective work. The chances of bringing those decisionmakers to even the most modest form of accountability are remote under the present system of labor law. The NLRB, even prior to chairman Dotson's reign, has taken corporate definitions at face value, ignoring the transparent reality that these corporate machinations are, at bottom, no more than liability avoidance schemes.

Accordingly, the Hafts in Washington, D. C., in comfortable isolation, can attempt to take over Safeway in a move that results in the termination of approximately 20,000 employees all over the country. While the Hafts and Safeway management play boardroom macho, the lives of Safeway workers are devastated. We desperately need a political and legal system that will bring such gamesmen into some form of social accountability. My concern for the children of the Safeway workers, and the stability of their lives, may be branded by some as an indication of a bias against anti-free enterprise. My view, however, is in reality much more modest. I believe that any just system of labor law and labor policy would take into account the social consequences of private and self-interested decision makers. I do not think that any just system would allow such corporate management to turn the families of 20,000 workers into pawns in a corporate strategy. With great power goes great responsibility.

Current labor law is totally inadequate to this moral task. It developed at a time when U.S. Steel was U.S. Steel. Today, most unions deal with corporate satellites and their managers who are remote from the real decision makers, and have no policy discretion. The satellite is kept on a short profitability leash while

¹⁵ 29 U.S.C. § 151(2) (1982). Similarly, *in pari materia*, the Fair Labor Standard Acts, at 29 U.S.C. § 203, defines the term employer as "any person acting directly or indirectly in the interest of an employer in relation to an employee. . . ."

its assets, that is, whatever capital investment is required by its operations, have been hypothecated for the benefit of the parent. Liability has been delegated downstream and profit upstream. At the slightest hint of failure to meet short-term goals, the satellite is junked. Labor law has not kept pace with these developments in American corporate practice.

These developments are nothing more than the labor law consequences of the devaluation of the American capital infrastructure and industrial base in the pursuit of short-term profit. Just as we have devastated our industrial capacity and dispersed our skilled work force, we have scrapped the goal of industrial stability through collective bargaining. Commentators like Mr. Steptoe can only pretend that the war on American industry waged by short-term profiteers has not also ruined the system of labor law created to adjust rights in a past era when America valued industry and production. In short, when American labor law was established, an auto manufacturer could not walk away from its assembly plant and set up shop elsewhere under another name. Once the union secured representational rights for the thousands of workers employed there, the employer had to bargain. Today, these assumptions about what a bargaining unit should be, what a primary employer was, and what the role of a union was—a majority representative—have been to a great degree outmoded.

Because this scheme of achieving industrial peace through free collective bargaining has been frustrated by employer avoidance schemes, the collective bargaining unit no longer has any durability. The operation itself is sold, transferred, moved, or pledged at a rapidity that would astound the labor leaders of 1936, 1947, and 1959. As we have downgraded and neglected our industrial infrastructure, so too have we divested the collective bargaining unit of its unity and function as a framework for defining and vindicating majoritarian rights in the work place via collective bargaining.

Actual industrial operating units have become more and more irrelevant to corporate organization charts because financial interests have splintered and rearranged them to suit the needs of the “deal,” and the very legal definition of the responsible party in labor law has become more and more elusive. Perhaps Mr. Steptoe is correct that the rights of workers are defined. However, the party against whom they are to be enforced has become, in his words, ephemeral. Gains at the bargaining table are nullified by unilateral changes in corporate structure. As the noted labor reporter, A. H. Raskin, observes, the inevitable result is that free collective bargaining and industrial stability have become casualties of this process. As Raskin rightly concludes, the only alternatives to private ordering by institutions in free collective bargaining are chaos or government intrusion:

No . . . [intent to stay in the business] can be discerned where one looks at the dozens of industries that have become the targets of Wall Street freebooters actuated by considerations utterly unrelated to providing any kind of service. In company after company, including a good many in which management and unions have worked conscientiously for several years to erect solid structures of worker

participation, raiders evince primary interest in bidding up the stock through take-over attempts based on financial hanky-panky that borders on larceny.

Their depredations, whether carried on in conjunction with the existing corporate administration or in opposition to it, are likely to result in the liquidation of some or all of the company's properties and in a suffocating increase in debt that leaves the enterprise highly vulnerable whenever business falls off. . . . Plant closings ordered without advance notice, contracting out of work formerly done inside the enterprise, pay raises for the managers but not the workers, all these tear the fabric of trust that must undergird every effective plan. But the worst damage is done by mergers that leave workers, who were told yesterday that they were the heart and soul of Corporation X and partners in the fullest degree in all its activities, exposed to sudden death as surplus because their unit can't cut the mustard in profit expectations demanded by its new lord and master, Conglomerate Y.

. . .

If unions lose their credibility as a social balance through further shrinkage, government will feel obliged to step in more emphatically to fill voids in employee protection. . . . The inevitable effect, unhappily, if government becomes too intrusive in regulating industrial relations, is that rigid rules will compel more conformity where the need is for more flexibility in the work place. Straitjackets are surely the wrong way to go.¹⁶

If the respondents are correct when they argue for reform over abolition, I believe they must begin to articulate a legal framework for holding those who make the decisions about industrial life accountable, and for securing a more durable form of worker participation in decisions that affect their working lives and the fate of their families. Justice in the workplace remains a moral imperative, regardless of prevailing political winds. As an element of the social compact on workers' rights and industrial peace, the NLRB has failed.

I welcome the well-written and thoughtful views of my respondents and relish this debate. I look forward to the time when social justice issues, regardless of the prevailing political winds, are treated with the seriousness they deserve. As the American Bishops teach:

Large financial institutions, such as commercial banks, investment banks, and insurance companies, also possess vast power to shape economic life. With this power goes responsibility and the need for both moral and institutional accountability.

. . .

Owners, managers, and financiers have not created this capital on their own. They have benefited from the work of many other persons and from the contributions of the communities which support their endeavors. Thus, they are ac-

¹⁶ Raskin, 3 LAB. LAW. 52-53 (1987).

countable to them when they make decisions about the wealth they hold in trust. . . .¹⁷

¹⁷ *Bishops' Pastoral, Catholic Social Teaching and the U.S. Economy* (1st draft), 14 ORIGINS NAT'L CATH. DOCUMENTARY SERV. (NC) No. 22-23, at 354 (1984).

